IN THE MATTER OF a Board of Inquiry appointed pursuant to s. 38 (1) of the Human Rights Code, R.S.O. 1990, c. H-19

B E T W E E N

JOHN BELONY

Complainant

and

NORMAN KENNEDY

Respondent

Date of Complaint: May 8, 1991 (Amended June 23, 1992)

Hearing: Toronto, Feb. 1, 1995.

Board of Inquiry: Lorne Slotnick

Appearances: Susan McDonald, for Ontario Human Rights Commission
Norman Kennedy, respondent.

This is a complaint that John Belony was discriminated against because of race, colour and marital status when he was denied an apartment in 1991.

Mr. Belony did not attend the hearing, and the Ontario Human Rights Commission presented no evidence, saying it has been unable to make contact with the complainant recently despite numerous phone calls and letters.

I am satisfied that the Commission has made a substantial effort to contact Mr. Belony, and also that Mr. Belony knew the date and place of the hearing. The dates were set in July, 1993, and Mr. Belony apparently attended a pre-hearing case conference in October, 1994.

The complaint is therefore dismissed.

DATED at Toronto, Ontario

February 9, 1995

Lorne Slotnick

Board of Inquiry

D E C I S I O N

THE FACTS

This complaint was filed by Kerryann Henwood. She was employed from September 18 to October 23, 1989 by the Corporate Respondent, which produced building supplies. Ms. Henwood worked on an assembly line with four male co-workers, under the supervision of the Respondent Claudio Saggese, the Production Supervisor of the Corporate Respondent. Mr. Saggese was a member of management, having duties in the areas of hiring, firing, discipline, supervision of production, quality control, assembly, maintenance and scheduling of staff and work.

The Complainant alleges that during her short period of employment, Mr. Saggese as well as a male co-worker, Joseph Yankson, made a number of sexually explicit or otherwise objectionable comments to her. She asserts that the Respondents thereby subjected her to sexual harassment, indirect discrimination and a poisoned work environment, contrary to what are now sections 7(2) and 5(1) of the *Human Rights Code*, R.S.O. 1990, c.H.19, and that she was forced to resign at least in part as a result of this conduct.

I heard the testimony of the Complainant and her parents, and I also heard the testimony of the Respondent Saggese as well as his successor as Production Supervisor, John Templeman. The Complainant's testimony contained allegations of nine incidents within the three final weeks of her employment which, if true, undoubtedly constitute violations of the provisions of the Code listed above. Mr. Yankson could not be located by the Commission and, for this reason, he was removed at the outset of the hearing as a Respondent. Mr. Saggese denied that he had heard any of the statements by Mr. Yankson, and denied any participation in such conversations on his part.

Where the testimony of the Complainant and Respondent Saggese is in conflict, I have no hesitation in accepting Ms. Henwood's evidence for the following reasons:

1. The Complainant testified in a straightforward, credible way, and the impact of her testimony was not lessened in any way through cross-examination by Mr. Van Wart. She was not cross-examined by Mr. Saggese.

2. Ms. Henwood's testimony that Mr. Yankson and/or Mr. Saggese committed the offensive conduct is consistent with a number of other pieces of evidence:

(a) The information which she provided to her parents and her doctor at the time, although I place little weight on these prior consistent statements standing alone;

(b) Her complaint to the Commission two days following the termination of her employment, and her detailed statement of the incidents which the Commission received on October 30, 1989;

(c) The statement dated May 9, 1990 and the testimony of John Templeman, who was called as a witness by the Commission but held a position in the management of the Corporate Respondent, having replaced Mr. Saggese in December 1989. Mr. Templeman's evidence contradicted Mr. Saggese's, in that he witnessed Mr. Saggese and Mr. Yankson telling jokes of a sexual nature that Ms. Henwood could have overheard.

Ms. Henwood was a 17-year-old woman with a grade 12 education, who undertook employment on the assembly line of the Corporate Respondent as her first job after high school. Ms. Henwood was evidently a vulnerable, sensitive woman, and the events described below clearly had a traumatic impact on her.

As she stated, Ms. Henwood "could not have been happier" when she obtained the job. She worked on an assembly line, and her responsibilities included packaging, assembly and quality control. Mr. Saggese's "office" was in the lunch room, and he was the supervisor of the plant where Ms. Henwood worked.

Ms. Henwood's satisfaction with the job changed when Joseph Yankson was hired as a co-worker about three to four weeks following her hiring. Mr. Yankson and Mr. Saggese established a friendship, and Mr. Yankson "started throwing comments at me".

The nine incidents, all of which occurred during the following three weeks of Ms. Henwood's employment, were as follows:

1. Ms. Henwood was sweeping near the lunch room, when Mr. Yankson asked her if she had a boyfriend. When she said that she did not, he said that he needed a girlfriend. She responded, "Not me". He asked, "Don't you want to have fun?". She said, "No". Ms. Henwood was hurt, but "brushed it off" and continued to work. No one else was present.

2. In the lunch room, with all of Ms. Henwood's male co-workers and Mr. Saggese present, Mr. Yankson put a blow-pipe between his legs while he was in a sitting position and asked her, "Do you want to blow me?" Ms. Henwood turned her head down and read her newspaper while the co-workers and Mr. Saggese said nothing, but laughed.

3. On another occasion, Messrs. Yankson and Saggese were in the lunch room with Ms. Henwood. Mr. Yankson asked her what she did when she went home. She said that she ate dinner, exercised and went to sleep. Mr. Yankson responded, "What exercise -- massage yourself?" Ms. Henwood did not respond; Messrs. Saggese and Yankson laughed.

4. In another incident in the lunch room, Messrs. Saggese and Yankson were talking about having girlfriends outside marriage. Mr. Saggese said to Ms. Henwood that her father had a girlfriend. She denied this. Mr. Yankson spoke out and said, "guys get bored, and need something different". Mr. Saggese continued to press Ms. Henwood to the effect that her father had a girlfriend, and Messrs. Saggese and Yankson laughed.

5. In the lunch room, Mr. Yankson taunted Ms. Henwood about her weight, saying that she looked pregnant and asked her what kind of exercise she did. Ms. Henwood was self-conscious about her weight and denied that she was fat. Mr. Saggese was not present.

6. Mr. Yankson made similar remarks regarding Ms. Henwood's weight in another incident, when Mr. Saggese was present. He said, "guys don't like fat girls". Mr. Saggese was present and laughed.

7. Again in the lunch room, Mr. Saggese told Mr. Yankson, in Ms. Henwood's presence, that a neighbour had come over wearing a mini-skirt, and that he was aroused, had a "hard-on" and had to go upstairs. Ms. Henwood felt embarrassed and insulted.

8. Messrs. Yankson and Saggese were discussing their shoe sizes in the lunch room, again in Ms. Henwood's presence. Mr. Yankson asked Mr. Saggese what size shoes he wore, and Mr. Saggese said "size 11". Mr. Yankson then said, "My size is long and thick". Mr. Saggese laughed and asked Mr. Yankson how he could say that with a straight face. Mr. Saggese said, "black guys don't blush". (Mr. Yankson is black.)

9. Messrs. Yankson and Saggese joked in the lunch room, again in Ms. Henwood's presence, about a particular pornographic movie. Ms. Henwood was reading the newspaper nearby, and was embarrassed and upset.

Ms. Henwood never complained at work about the comments and conduct described above, although I accept her testimony that she felt deeply offended and humiliated. She did not believe that she could complain to Mr. Saggese, whom she believed to be her boss, since he was a perpetrator. She did not approach Mr. Tim Van Wart, Mr. Saggese's Supervisor, and she never considered speaking to Mr. Gerry Van Wart, the Senior Manager, whom she saw only once. Indeed, it appears that she did not tell anyone about the harassment she was undergoing until the day she left, when she unburdened herself to her mother, after she left the job. Again, I accept

Ms. Henwood's explanation that she did not take any steps in response to the work atmosphere because she needed this job, her first job, and in particular she was saving money to buy a car.

Ms. Henwood's last day of work was October 23, 1989. That morning, she encountered a problem with one of the machines, and she reported it to Mr. Templeman. Mr. Templeman went to Mr. Saggese, and soon Ms. Henwood found herself in a meeting with Mr. Saggese in his office. Mr. Saggese accused the Complainant of not having alerted Mr. Templeman to the problem, and Ms. Henwood became very upset and began crying. Her frustrations of the previous three weeks welled up in her, and she became frightened of Mr. Saggese and anxious to leave the closed room as quickly as possible. (I hasten to add that Mr. Saggese provided no apparent justification for Ms. Henwood to be frightened of him.)

In order to achieve her "escape", Ms. Henwood told Mr. Saggese that she was having a problem with her parents that had caused her to be upset, and she needed to leave. She ran out of the lunch room and found a telephone to call her mother. She asked her mother to pick her up, and then Ms. Henwood waited outside. Her mother left right away to pick her up, and found her lying on the driveway, crying. She told her mother, "I can't take it any more; I can't stand it". On the way home, she was hysterical, and told her mother that "men were always talking dirty" to her. Mrs. Henwood could not make sense of what her daughter was saying, and gave her 222s to calm her down. Gradually, over that day and the following days, the Complainant revealed to her mother many of the specific details which I have enumerated above of the harassment which she underwent.

Shortly after the Complainant and her mother arrived home, Ms. Henwood's father called. Mrs. Henwood told him of the Complainant's departure from work and that from what she had heard, the Complainant had been sexually harassed. She also told Mr. Henwood that the Complainant had left her boots at work. Mr. Henwood was very upset and went to the workplace to get her boots.

In the mean time, Mrs. Henwood called Gerry Van Wart, identified herself, and said: "We have a problem". He knew already. Mr. Van Wart said that he had told his son, "We should never have hired a pretty girl to work in the plant by herself".

According to Mrs. Henwood, Mr. Wan Wart was "very nice" over the phone. He asked Mrs. Henwood to write a letter, and the company would look into the problem. He said that if Messrs. Saggese and Yankson were proven wrong, they would be terminated. He also said that Ms. Henwood could have her job back if she wished.

Ms. Henwood was still crying and was now vomiting. Mrs. Henwood took her to her family physician, Dr. Eddie Lo. His medical report (Exhibit 11) described her visit as follows:

> "On October 23, 1989 Miss Kerryann Henwood visited my office in the afternoon accompanied by her mother Donna Henwood, Mrs. Henwood told me that there had been an incident at Kerryann's workplace and consequently Kerryann suffered a severe migraine headache and vomited once.
>
> Kerryann was very distraught and crying and required an injection of Talwin and Gravol to calm her down and relieve some pain from the migraine headache.
>
> Kerryann stated that over a period of several weeks, she had been subjected to verbal abuse at her workplace. This abuse was about her appearance, her weight and sex. She stated that people at her work made fun of her and made passes at her.
>
> She appeared very frightened. She related to an incident during which a man entered the room and shut the door blocking her exit, and making comments about her. Being in a room with nobody near by with a man really scared her. She dashed out of the room finally at her first opportunity."

In the mean time, Mr. Henwood had gone to the Corporate Respondent's plant, where he asked to speak to Mr. Saggese. He told Mr. Saggese that his daughter had been sexually harassed by a black man, and asked to see him. Mr. Henwood looked at him from across the room, picked up her boots, and told Mr. Saggese that if there had been sexual harassment, Mr. Saggese would

"never hear the end of it". Mr. Saggese did not respond, other than to say that Ms. Henwood's job was still available if she wanted to come in the next day.

The Complainant and her parents testified about the effect on her of the sexual harassment that she experienced. She was afraid of men; did not want to leave her house; had migraine headaches; and suffered a re-occurrence of bulimia. Dr. Lo stated in his medical report:

> "In my opinion, she would have been able to deal effectively with her depression and adolescent problems and bulimia and recover much sooner had the incident not occurred. The incident certainly aggravated her depression and insecurities and prolong her adjustment."

Ms. Henwood contacted the Ontario Human Rights Commission two days after she left her job.

Ms. Henwood began an active search for employment about one month later, and was able to secure employment with Cole's Book Store at Sherway Gardens about 12 weeks later, on January 13, 1990. Her efforts at mitigation up to the date of her re-employment were not seriously attacked.

LIABILITY

On the facts described above, there is no doubt that Ms. Henwood was subjected to sexual harassment and a poisoned work environment by Mr. Saggese. During her short but harrowing experience as an employee of the Corporate Respondent, the Complainant was forced to endure no less than eight incidents of verbal harassment in which Mr. Saggese was either directly or indirectly involved, and this harassment was inflicted on the Complainant "because of her gender".

As the Board of Inquiry stated in ***Lampman v. Photoflair Limited*** (1992), 18 C.H.R.R. D/196, at D/207, three elements in the statutory definition of harassment under s.10(1) of the Code must be satisfied.

> "The conduct complained of must constitute a 'course' of 'comment or conduct'. Secondly, the conduct must be 'vexatious'. Finally, the perpetrator must know or 'ought reasonably' to have known that the conduct was 'unwelcome'.

It is evident on the recitation of facts set out above that the first two criteria were satisfied.

On two occasions, the Complainant indicated that she objected to the comments, and Messrs. Yankson and Saggese knew or should have known that the comments were unwelcome. As the Board of Inquiry stated in ***Ghosh v. Domglas Inc. (No.2)*** (1990), 17 C.H.R.R. D/216, at D/223, liability under s.109(1) of the Code follows where a course of vexatious comment or conduct is undertaken in circumstances where "reasonable people in the same situation as the complainant so find it". In this case, the proper reference point is a reasonable person in the same position as Ms. Henwood, given her age, work experience and prior life experience. Employers must be sensitive to the harmful and debilitating consequences, both to themselves and to their employees, of sexual harassment, and should therefore take close account of the objective facts such as the age and work experience of their employees, in addition to the prevailing work environment.

As the Board further noted in ***Ghosh***, ***supra***, at D/223, "the conclusion that a respondent ought reasonably to have known the conduct to be unwelcome is not precluded by the fact that its victim suffered in silence". Thus, Ms. Henwood's lack of overt reaction to several of the incidents does not exclude Mr. Saggese's liability.

In addition to his directly offensive actions, Mr. Saggese is responsible for his failure to act in the face of Mr. Yankson's harassing conduct.

As La Forest J. stated in ***Robichaud v. Canada (Treasury Board)***, [1987] 2 S.C.R. 84 at p.94, only an employer can remedy an unhealthy work environment, and therefore a duty is imposed on it to cleanse the work environment of discriminatory actions. Clearly, Mr. Saggese was a

member of the management of the Corporate Respondent, and that Corporate Respondent is therefore liable under s.45(1) of the Code for the poisoned work environment which he created for the Complainant.

In my view, the Corporate Respondent is also liable for Mr. Saggese's sexual harassment contrary to s.7, under the ***Robichaud*** principle. Even without a federal equivalent of s.45(1) of the Ontario Code, Mr. Justice La Forest stated in ***Robichaud***:

> "Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employee 'in the course of employment', interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment."

Obviously, the same considerations regarding the unique position of the employer to combat discrimination in the workplace apply equally to harassment. Moreover, harassment is a form of discrimination, contrary to s.5 of the Code (***Janzen v. Platy Enterprises Limited*** (1989), 10 C.H.R.R. D/6205 (S.C.C.)), and so the exclusion of *s.7* from s.45(1) of the Code is not determinative.

I am not persuaded by the two arguments which are commonly put forward to exclude sexual or racial harassment from the ***Robichaud*** principle. First, it is said that since s.45(1) excludes s.7 from deemed corporate liability, ***Robichaud*** does not apply. This fails to take account of the sequence of events: like many developments in human rights law, Supreme Court jurisprudence (in this case the ***Robichaud*** decision) overtook prior legislative reform (i.e. s.45(1)). This was true in ***Robichaud*** itself; the Crown argued that since Parliament felt obliged to amend the *Canadian Human Rights Act* to widen corporate liability after the events in issue, but before the hearing of the appeal, the court should presume narrower corporate liability to have been the pre-amendment legislative intention. The Supreme Court rejected this argument, stating at pp.96-97:

> "I do not see the relevance of these provisions to the pre-existing situation. They were obviously enacted to redress the prevalent approach of the courts (see, for example, ***Re Nelson and Byron Price and Associates Limited*** (1981), 122 D.L.R

> (3d) 340 (B.C.C.A.)). In subsequently taking legislative action to correct this approach, Parliament was free to adjust liability in any way it wished, whether by imposing a greater or lesser burden on an employer than would have been the case before the amendments. Precisely what balance was achieved by these new provisions, I need not consider."

Similarly, s.45(1), which was enacted in 1982, can now be viewed, with the benefit of hindsight and the guidance of the Supreme Court in ***Robichaud***, as additional (and in some cases superfluous) protection beyond that afforded by judge-made human rights law.

Second, it has been argued that harassment is somehow qualitatively different from discrimination, with the result that individual harassing conduct of employees or supervisors within the workplace should not be regarded as action within the scope of employment. It follows from this approach that an employer is rightly held responsible for discriminatory actions falling within s.5 of the Code, but not harassment contrary to s.7 and s.10(1). Again, this argument is contradicted by two decisions of the Supreme Court: ***Janzen***, ***supra***, which held that harassment does not fall outside the prohibition of discrimination, but is rather one pernicious species of discrimination; and ***Robichaud***, in which the Supreme Court specifically found the Department of National Defence liable for sexual harassment by its personnel.

It follows that I respectfully disagree with Professor Hubbard, who concluded in ***Shaw v. Levac Supply Limited*** (1991), 14 C.H.R.R. D/36 and ***Ghosh***, ***supra***, that in Ontario, sexual or other harassment falls outside the ***Robichaud*** liability principle.

My factual findings and conclusions concerning corporate liability evidently lead to an award of damages under the harassment and non-discrimination provisions of the Code. I also find that the Complainant's primary, if not sole, reason for ending the employment relationship was this harassing and discriminatory conduct. It is, of course, sufficient to establish liability where the discriminatory conduct is a significant factor in the Complainant's decision to resign: ***Lampman***, ***supra***, at D/209; ***Shaw***, ***supra***, at D/62.

REMEDY

Sub-section 41(1) of the Code provides:

> (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9, by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

These remedial provisions should be construed liberally to achieve the purposes and policies of human rights legislation: ***Cameron v. Nel-Gor Castle Nursing Home*** (1984), 5 C.H.R.R. D/2170 (Ont.Bd.),at D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a complainant to meet the broader policy objectives of the Code. The objectives of the Code are to put the Complainant in the same position she would have been in had her human rights not been infringed by the Respondents: ***Cameron, supra*** at D/2196, paras. 18526-27. The measure of monetary damages in a case such as this is the amount that the Complainant would have earned had she not been denied the employment opportunity: ***Cameron, supra***, at D/2197, para. 18532; ***Piazza v. Airport Taxicab (Malton) Assn.*** (1989), 69 O.R. (2d) 281 (C.A.), at p. 284. The Complainant in this case had a duty to mitigate her damages; however, the onus of proving a failure to mitigate lies upon the Respondents, as it does in other areas of the law: ***Gohm v. Domtar Inc. (No.4)*** (1990), 12 C.H.R.R. D/161 (Ont. Bd.) at D/180, citing ***Red Deer College v. Michaels***, [1976] 2 S.C.R.

324 (S.C.C.). As noted above, in this case, there was no challenge to the Complainant's mitigation efforts.

The Code provides for an award of damages under s.41(1)(b) on two separate grounds:

(i) Monetary compensation to make restitution for the loss arising out of the infringement; and

(ii) monetary compensation not exceeding $10,000.00 for mental anguish where the infringement has been engaged in wilfully or recklessly.

Cameron*, *supra, at D/371 para. 18548, at p.2199.

I calculate the Complainant's compensation for lost wages as follows:

October 23, 1989 to January 13, 1990 (12 weeks @ 40 hours/week x $8.50/hour) = $4,080.00.

In assessing the loss arising out of the infringement, other than wages, I note that assessment of damages for harassment requires consideration of the following factors:

(a) the nature of the harassment, for example, verbal alone or physical as well;
(b) the degree of aggressiveness and physical contact in the harassment;
(c) the ongoing nature, that is, the time period of the harassment;
(d) the frequency of the harassment;
(e) the age of the victim;
(f) the vulnerability of the victim;
(g) the psychological impact of the harassment upon the victim.

(***Torres v. Royalty Kitchenware Ltd.*** (1982), 3 C.H.R.R. D/858 (Ont. Bd.) at D/873)

Where the Complainant is seeking damages for mental anguish under s.41(1)(b), as well, the infringement must be engaged in wilfully and recklessly; that is, the act upon which it is founded must be intentional and the infringement must be the purpose of that act. "Wilful" and "reckless" do not require that the Respondent must be aware that his/her conduct constitutes a breach of the Code: ***Lampman, supra*** at p.D/210.

Loss of dignity and self-respect are relevant considerations in assessing general damages for "loss arising from the infringement". Damages for this loss should reflect the seriousness of the injury caused: ***Cameron, supra***, at D/2198, para. 18538. An inherent but separate component of the damage award for "loss arising out of the infringement" in s.41(1)(b) reflects the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the Complainant, whose human rights are infringed, the very human right which has been contravened has intrinsic value. The loss of this right is therefore an independent injury suffered by the Complainant: ***Cameron, supra***, at D/2198, para. 18539.

The Respondent is liable for compensation which includes what is necessary for the increased injury and loss suffered by the "thin-skulled" Complainant. The Respondent takes his victim as he finds her: ***Cameron, supra***, at D/2198, para. 18543; ***Ghosh, supra***, at p.D/232.

In this case, the harassment was entirely verbal, rather than physical. There was no aggressiveness or physical contact. On the other hand, the harassment was of a concentrated, frequent and ongoing nature over a short time span. The Complainant was young and vulnerable, and the offensive conduct had a serious effect on her health, which did not abate for many months after her departure. I assess her damages under s.41(1)(b) for "loss arising out of the infringement" at $2,000.00. Under the head of mental anguish, I include compensation for the longstanding psychological impact and mental anguish which the Complainant suffered, and I assess her damages at $4,000.00.

The Complainant's total compensation for lost wages, loss arising from the infringement and mental anguish is therefore $10,080.00. She is entitled to interest on this sum from the date of service of the human rights complaint, which was May 3, 1990: ***Cameron, supra***, at D/2201, paras. 18564-65; ***Lampman, supra***. Applying at the rate of 15 percent under s.127 of the *Courts of Justice Act* from that date, the interest calculation for the period from May 3, 1990 to December 3, 1994 (55 months) is as follows:

$10,080.00 x 55/12 x 15% = $6,930.00

I therefore order the Respondents to pay the Complainant the total sum of $17,010.00.

DATED at Toronto this 9th day of February, 1995.

Raj Anand
Board of Inquiry

Released by:

BOARDS OF INQUIRY
150 Eglinton Avenue E.
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on February 21, 1995

Jim Curren
Registrar

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